

In The Supreme Court Of Ohio

State Of Ohio, :  
Appellee, :  
-vs- : Case No.: 2005-2264  
Nicole Diar, : **This is a capital case.**  
Appellant. :

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On Appeal From The Court Of  
Common Pleas Of Lorain County  
Case No. 04CR065248

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Diar's Motion to Reconsider

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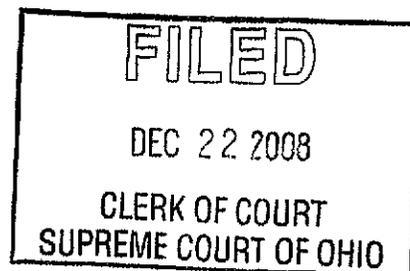
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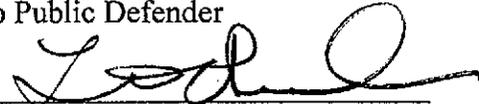
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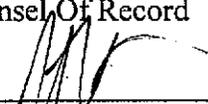
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On December 10, 2008, this Court vacated the death penalty in Nicole Diar's case. Diar requests that this Court reconsider its merits ruling affirming her convictions. This request is made under Sup. Ct. Prac. R. XI § 2 (A)(4). The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

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**Memorandum in Support**

**Proposition of Law No. IV**

A capital defendant is denied her substantive and procedural due process rights to a fair trial when a prosecutor commits acts of misconduct during the trial phase of her capital trial. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.

This Court rejected Diar’s claim that she was deprived of her due process rights during the trial phase of her capital trial when the prosecutor committed repeated and deliberate acts of misconduct. Nevertheless, this Court found several instances of misconduct by the prosecutor. This Court then went on to conclude that, for various reasons, each instance was not prejudicial.

This Court agreed with Diar that the prosecutor asked improper leading questions during Diar’s trial. This Court concluded that “(t)he prosecutor asked a leading question that improperly injected the qualifications of unnamed experts whom Dr. Matus consulted with in reaching his conclusion.” State v. Diar, \_\_ Ohio St. 3d \_\_, \_\_ N.E. 2d \_\_, 2008-Ohio-6266 ¶ 58. This Court concluded that the prosecutor’s improper questions were not prejudicial because it helped the defense to establish that Jacob did not die from a blow to the head. However, this Court failed to note that the prosecutor’s invocation of unnamed experts would also bolster the prosecution’s contention that Jacob had died from homicidal violence. This inference was prejudicial to Diar.

In questioning Dolence, the forensic radiographer, “the prosecutor improperly persisted in asking leading questions after the trial court had sustained defense objections to such

questioning.” This Court again found no prejudice because “earlier testimony had established evidence about the spread of the fire...” Diar, \_\_\_ Ohio St. 3d at \_\_\_, \_\_\_ N.E. 2d at \_\_\_, 2008-Ohio-6266 ¶ 170. However, this Court failed to consider the prejudicial effect of repeated improper evidence.

This Court concluded that the prosecutor asked witnesses Faulkner and Harkless improper leading questions. Diar, \_\_\_ Ohio St. 3d at \_\_\_, \_\_\_ N.E. 2d at \_\_\_, 2008-Ohio-6266 ¶ 171. The Court further concluded that the questions elicited “obvious” answers. However, the questions were highly prejudicial because the prosecutor’s phrasing of questions demonized Diar and evoked improper opinion and condemnation of her. The Court failed to consider the prejudicial effect of repeated negative opinions of Diar voiced by the prosecutor to obtain agreement from witness after witness.

This Court concluded that some of the prosecutor’s questions to witness Cantrell were improperly leading, but “mostly covered irrelevant matters.” Diar, \_\_\_ Ohio St. 3d at \_\_\_, \_\_\_ N.E. 2d at \_\_\_, 2008-Ohio-6266 ¶ 172. However, while questions about how the witness would behave if her child were burned in a fire were, in fact, irrelevant, they were also highly prejudicial to Diar. This Court agreed that the prosecutor’s questions to Detective Garcia were leading. Diar, \_\_\_ Ohio St. 3d at \_\_\_, \_\_\_ N.E. 2d at \_\_\_, 2008-Ohio-6266 ¶ 178-179. This Court concluded that “[t]he prosecutor also used leading questions in asking Garcia” about Diar’s clean appearance when exiting her house, her missing house keys, whether gasoline from Diar’s car possibly fueled the fire, whether there was evidence of a break-in to Diar’s house, and whether police checked all gas stations to learn whether Diar had purchased gas. Diar, \_\_\_ Ohio St. 3d at \_\_\_, \_\_\_ N.E. 2d at \_\_\_, 2008-Ohio-6266 ¶ 180. This Court found these questions to be improper, but concluded that they merely elicited “information already presented at trial”. Diar, \_\_\_ Ohio

St. 3d at \_\_ , \_\_ N.E. 2d at \_\_ , 2008-Ohio-6266 ¶ 180. Again, this Court failed to consider the cumulative effect of repeated, improper negative assertions about Diar. In addition, the prosecutor in reality had no evidence that Diar had obtained gasoline prior to the offense.

The prosecutor continued by asking Garcia a series of leading questions to suggest that Diar had moved her car to protect it from the fire she was allegedly planning to set. This Court stated that the “prosecutor’s leading questions suggested that Diar moved her car across the street so that it would not be destroyed after she started the fire.” The Court concluded that the prosecutor committed misconduct by continuing to ask leading questions after the trial court had sustained defense counsel’s objections. The Court then went on to state that “such misconduct did not pervade the trial to such a degree that there was a denial of due process.” Diar, \_\_ Ohio St. 3d at \_\_ , \_\_ N.E. 2d at \_\_ , 2008-Ohio-6266 ¶ 205. Clearly, however, the prosecutor’s misconduct was repeated, flagrant, and deliberate.

This Court found that the prosecutor asked witness Huff leading questions about her thoughts on the absence of gasoline on Diar’s clothes, and Diar’s habit of giving money to male friends, but concluded that “Huff’s opinion about these matters had little relevance.” Diar, \_\_ Ohio St. 3d at \_\_ , \_\_ N.E. 2d at \_\_ , 2008-Ohio-6266 ¶ 207. This Court also found that the prosecutor committed misconduct by asking Huff an improper question concerning Huff’s current opinion about whether Huff thought Diar could have killed Jacob, but concluded that “Huff’s opinion had no bearing on the underlying facts of the offenses.” Diar, \_\_ Ohio St. 3d at \_\_ , \_\_ N.E. 2d at \_\_ , 2008-Ohio-6266 ¶ 208. The prosecutor’s improper question did indeed have direct bearing on the underlying offense; it usurped the function of the jury and put words in Huff’s mouth that she might otherwise not have said.

The prosecutor also asked Huff improper leading questions about whether Diar maintained “a clean house...like a good mother” and whether a good mother would give her child codeine that belongs to someone else. *Diar*, \_\_ Ohio St. 3d at \_\_, \_\_ N.E. 2d at \_\_, 2008-Ohio-6266 ¶ 209. This Court concluded that because the trial court sustained objections to these questions that no error occurred.

This Court concluded that the prosecutor misbehaved by asking a sarcastic question about Diar going out at “gunpoint” after Jacob’s death, but that no prejudice occurred “because earlier testimony had explained Diar’s reasons for going out on the night of the funeral.” *Diar*, \_\_ Ohio St. 3d at \_\_, \_\_ N.E. 2d at \_\_, 2008-Ohio-6266 ¶ 210. This Court thus failed to consider the negative impact of the prosecutor’s sarcasm, and the fact that this was one more deliberate attempt to accumulate negative opinions about Diar.

This Court found that the prosecutor exaggerated testimony during closing argument, but found the comments to be “not unduly prejudicial.” Again, however, these were comments which painted Diar in a negative light, as someone who would let her child suffer to the point of “basically dying” before taking him to the hospital. *Diar*, \_\_ Ohio St. 3d at \_\_, \_\_ N.E. 2d at \_\_, 2008-Ohio-6266 ¶ 211. Although this Court concludes that the prosecutor’s argument that Jacob “most likely” smothered or drowned was a reasonable theory and a fair inference, this Court then concluded that Dr. Matus did not find that Jacob might have drowned, and “it is questionable whether the prosecutor’s argument [that Jacob might have drowned] represented a fair inference based on the record.” However, the Court found no plain error. *Diar*, \_\_ Ohio St. 3d at \_\_, \_\_ N.E. 2d at \_\_, 2008-Ohio-6266 ¶ 214-215. This Court also found that the prosecutor mischaracterized the defense argument in closing when the prosecutor stated that the defense wanted the jury to teach the government a lesson. *Diar*, \_\_ Ohio St. 3d at \_\_, \_\_ N.E.

2d at \_\_, 2008-Ohio-6266 ¶ 222. In finding no prejudicial error during closing argument, this Court ignored Supreme Court precedent that requires application of a stricter standard for a prosecutor's closing argument in a capital case. Caldwell v. Mississippi, 472 U.S. 320, 329 (1985). This Court has previously said that "there comes a time where prosecutorial misconduct during closing argument impairs a defendant's right to a fair trial." State v. Thompson, 33 Ohio St. 3d 1, 14, 514 N.E.2d 407, 420 (1987). This is such a case.

During Diar's trial, the prosecutor repeatedly used improper leading questions and argument to place his theories of the case before the jury, and to interject his own inflammatory opinions about Diar. Even where the trial court sustained objections by defense counsel, the negative inferences were already planted in the jurors' minds. The prosecutor's questions were phrased in such a way as to paint Diar in the most negative light possible.

Although this Court excuses some misconduct because defense objections were sustained, the Court fails to consider the cumulative and prejudicial nature of the prosecutor's leading questions, which reached the ears of the jurors repeatedly and deliberately in spite of defense counsel's objections. In some instances, the prosecutor simply ignored the admonitions of the trial court. This demonstrates the deliberate and pervasive nature of the misconduct. In the face of repeated misconduct by the prosecutor, defense objections became futile.

For example, in questioning Carol Abfall, a beverage store employee, about Diar's manner while going through the store drive-through, the prosecutor inserted improper remarks about Diar: "She didn't say, 'For God sakes, I just lost my son?'" A defense objection was sustained. (T.p. 2169). The prosecutor nevertheless tried again, pressing the witness, "Did she?" Defense counsel's objection was again sustained. (T.p. 2170). The prosecutor again asked the witness, "Does she ever say, 'For God sakes, I just lost my son?'" Again defense counsel

objected. The prosecutor continued to lead the witness concerning Diar's behavior . (T.p. 2170-71). This Court failed to consider the prejudicial nature of such repeated and flagrant misconduct.

To succeed on a claim of prosecutor misconduct, Diar must meet one of two standards. She must demonstrate either that the prosecutor's misconduct prejudiced a substantive right, see Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974) (citing Griffin v. California, 380 U.S. 609 (1965)) (footnote omitted); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001), or that the prosecutor's misconduct rendered the trial fundamentally unfair. See Berger v. United States, 295 U.S. 78 (1935); Gravley v. Mills, 87 F.3d 779, 786 (6th Cir. 1996).

The prosecutors' actions in this case must be examined in totality, which reveals a pattern of deliberate, flagrant misconduct. The prosecutorial misconduct in this case was designed to inflame the passions of the jury, to induce the jury to render a decision based on considerations other than proper law and evidence, and to tip the scale in favor of conviction.

In its review of this claim, this Court noted particular instances of misconduct, finding some to be improper, but not finding that such improper conduct rose to the level of a due process violation. However this Court failed to consider the cumulative effect of the comments, and failed to acknowledge that they were pervasive, flagrant, and deliberate.

While the trial court did sustain some of counsels' objections, the misconduct was so pervasive that the objections did little to thwart the prejudicial effects of the prosecutor's actions. State v. Smith, 14 Ohio St. 3d 13, 14-15, 470 N.E.2d 883, 885-86 (1984). See also Berger, 295 U.S. at 85. In spite of objections by defense counsel, the prosecutors continued to offer improper questioning, comments, and arguments. Such misconduct is flagrant. Additionally, the remarks were not isolated. Rather, the misconduct was extensive. Even where the trial court sustained

objections, the prosecutor returned again and again to impermissible conduct. The misconduct of the prosecutors was also deliberate. This Court is “not confronted with an off-hand remark in a heated trial.” Bates v. Bell, 402 F.3d 635, 648 (6th Cir. 2005). Deliberateness is easily illustrated by the extent of the misconduct and the prosecution’s defiance of trial court rulings. Id.

Errors must be considered for their cumulative effect. This includes errors to which defense counsel did not object. Berger v. United States, 295 U.S. at 85. The mere sustaining of objections may not be sufficient to cure such pervasive misconduct. Id. at 85. Each individual act of misconduct, or type of misconduct, is not separated out for consideration. Under such circumstances, it would be nearly impossible to succeed on a claim of misconduct. Rather, the alleged misconduct in its entirety should be reviewed to determine whether it “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” See Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly, 416 U.S. 637) (internal quotations omitted); See also United States v. Francis, 170 F.3d 546, 556 (6th Cir. 1999).

Under the proper analysis, the totality of these circumstances, the prosecutor misconduct at Diar’s trial rendered those proceedings unfair and denied her due process. See DePew v. Anderson, 311 F.3d 742, 751 (6th Cir. 2002) (“Cumulatively, it is clear that these errors are not harmless.”); Bates, 402 F.3d at 648.

Additionally, this Court was incorrect in finding that the trial court, by sustaining certain objections, alleviated the impact of the prosecutorial misconduct. As the Supreme Court recognized in Berger, sometimes the misconduct is simply too much for the trial court’s instructions to cure. 295 U.S. at 85. See also Boyle v. Million, 201 F.3d 711, 717-18 (6th Cir. 2000). Even when the trial court sustained counsels’ objections, the prosecution returned to

prohibited areas time and again. Even sufficient evidence of guilt cannot save a conviction tainted by misconduct. Boyle, 201 F.3d at 717-18.

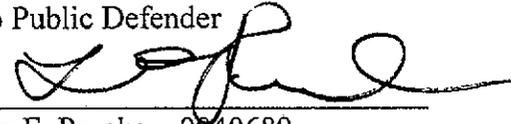
Diar was denied her due process rights when the prosecutor engaged in repeated acts of misconduct. This Court should vacate its opinion and remand Diar's case for a new trial.

### Conclusion

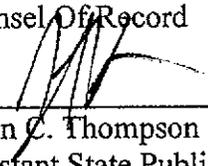
For the foregoing reasons, this Court must vacate its opinion as to Nicole Diar's convictions, reverse Diar's convictions, and remand for a new trial.

Respectfully submitted,

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Certificate Of Service

I hereby certify that a true copy of Diar's Motion to Reconsider was forwarded by regular U.S. Mail to Anthony Cillo, Assistant Prosecuting Attorney, Lorain County Prosecutor's Office, 3rd Floor, Justice Center, 225 Court Street, Elyria, Ohio 44035, this 22nd day of December, 2008.



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